

BRB No. 92-0965

BILLY J. LEWIS

Claimant-Respondent

v.

BETHLEHEM STEEL CORPORATION

Self-Insured

Employer-Petitioner

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (90-LHC-3279) of Administrative Law Judge John C. Holmes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act.) We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sought benefits under the Act for a noise-induced work-related hearing impairment. Dr. Rosell performed audiometric evaluations on claimant on three separate dates and found a 13.4 percent binaural hearing impairment. Claimant's Exhibit 1. Claimant was subsequently examined by Mr. Saltsman, who has a Master's degree in audiology and found a hearing loss of 11.9 percent. Claimant's Exhibit 2. Finally, he was examined by Dr. Baker, a board certified otolaryngologist, who found a zero percent binaural hearing impairment. Employer's Exhibit 1.

In his Decision and Order, the administrative law judge initially determined that the three test results of record met the criteria for consideration as presumptive evidence of the degree of loss. 20 C.F.R. §702.441. After a description of various technical factors used in weighing this evidence, he noted that Dr. Rosell's 13.4 percent and Mr. Saltsman's 11.9 percent ratings were sufficiently

close that normally they would be considered corroborative evidence of the extent of the loss; thus, if all the results were of equal probative weight, he stated he would choose either Dr. Rosell's rating or Mr. Saltsman's rating or average the two. He found, however, that Dr. Rosell's 13.4 percent binaural rating and Mr. Saltsman's 11.9 percent result were of "less probative weight" than Dr. Baker's zero percent rating. Decision and Order at 3. Specifically, the administrative law judge noted that Dr. Rosell examined claimant on three different days and reached identical results each time, which according to Dr. Baker's testimony cast doubt on the result, as it is unusual to achieve identical results on tests conducted on separate days. The administrative law judge also gave Mr. Saltsman's tests less than full probative value because they were obtained within a short time after work exposure to noise. The administrative law judge cited Dr. Baker's opinion that under those circumstances, a higher loss is likely than if the individual were not exposed to noise for several hours. Finding the report supportive of *some* impairment, the administrative law judge concluded it was not supportive of Dr. Rosell's result due to the potential inaccuracy and as it would indicate the *maximum* hearing loss. *Id.* (emphasis in original). The administrative law judge then accorded Dr. Baker's test results "near full probative weight," since they were the most recent, they were done by an expert, and Dr. Baker credibly supported his results and submitted himself to cross-examination. *Id.* The administrative law judge also noted, however, that Dr. Baker only took tests on one day. Thereafter, the administrative law judge stated that an average of the two impairment ratings of Drs. Baker and Rosell seemed appropriate under the facts of the case and that such an averaging was in keeping with the beneficent purpose of the Act, *id.* at 4; accordingly, the administrative law judge awarded claimant benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), for a 6.7 percent binaural hearing impairment.

On appeal, employer contends that the administrative law judge's decision to average, and thus treat equally, the impairment ratings rendered by Drs. Rosell and Baker is inconsistent with his credibility determinations. Claimant has not filed a brief in the appeal.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work related injury. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1995). Employer, on appeal, contends that the administrative law judge's decision to treat equally the impairment ratings rendered by Drs. Baker and Rosell is inconsistent with his substantive credibility determinations indicating that these ratings were of differing probative value. We agree with employer. The administrative law judge found that Dr. Rosell's rating was of "less probative weight" than Dr. Baker's rating, which he accorded "near full probative weight." However, the administrative law judge ultimately calculated claimant's loss of hearing by averaging these two ratings. Thus, despite findings which indicate that he would not accord equal weight to the ratings rendered by Drs. Rosell and Baker, the administrative law judge's decision ultimately to average the two ratings effectively accorded each equal weight. The administrative law judge's findings regarding the relative weight of these two ratings of record are thus inconsistent with the result achieved. Accordingly, we vacate the administrative law judge's finding that claimant is entitled to compensation for a 6.7 percent noise-induced work-related binaural hearing loss and remand the case for the administrative law judge to reconcile his findings regarding the credibility of the ratings rendered by Drs. Baker and Rosell with his calculation of claimant's compensable impairment.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is

vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge